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Ethicon Endo-Surgery, LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

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RICK ROGERS as Personal
Representative of the ESTATE OF NO.
LISA MARIE ROGERS,

NOTICE OF REMOVAL

Plaintiff,

-vs-

ETHICON ENDO-SURGERY, LLC
and JOHN DOES 1through 10,

Defendants.

.....

Pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, Defendant Ethicon Endo-Surgery, LLC, hereby removes this action from the Montana Thirteenth Judicial District Court, Yellowstone County, where it is currently pending, to the United States District Court for the District of Montana. The Court has jurisdiction over this action, and it is properly removable to this Court, because the parties are completely diverse and the amount in controversy exceeds \$75,000.

In support of this removal, Defendant state as follows:

1. On or about December 11, 2020, Plaintiff filed a Complaint against Defendant in the Montana Thirteenth Judicial District Court, Yellowstone County, bearing case number DV-20-1570.

2. Plaintiff alleges that he is the personal representative of his late wife Lisa Marie Rogers and that her death in May, 2018, was caused by the use of an Endo-Surgery Endoscopic Curved Intraluminal Stapler manufactured by Defendant during gastric bypass surgery performed on her in April, 2018. (Compl. ¶¶ 2-31.)

3. As set forth more fully below, this case is properly removed to this Court pursuant to 28 U.S.C. § 1441 because the Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, and defendants have satisfied the procedural requirements for removal.

GROUND FOR REMOVAL

4. This action may be removed under 28 U.S.C. § 1441(a) because the Court has original jurisdiction under 28 U.S.C. § 1332(a)(1). There is complete diversity of citizenship, and the amount in controversy exceeds \$75,000, exclusive of interest and costs. In addition, no defendant is a citizen of the State of Montana.

A. Complete Diversity of Citizenship Exists Between The Parties.

5. Plaintiff's decedent was a citizen of the State of Montana. (Compl. ¶ 1.) Plaintiff is now a Montana citizen.

6. Defendant Ethicon Endo-Surgery, LLC, is, and was at the time Plaintiff commenced this action, a limited liability company organized under the laws of the State of Delaware with its principal place of business in Guaynabo, Puerto Rico, and is therefore a citizen of the Territory of Puerto Rico for purposes of determining diversity. 28 U.S.C. § 1332(c)(1).

7. Thus, there is complete diversity among the parties.

B. The Amount-In-Controversy Requirement Is Satisfied.

8. The amount-in-controversy requirement for diversity jurisdiction is satisfied in this case because it is clear from the face of Plaintiff's Complaint that the "matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a).

9. Specifically, plaintiff alleges in the Complaint that Plaintiff's decedent Lisa Marie Rogers' death having been caused by the malfunctioning of the, he has suffered "both economic and non-economic damages." (Compl., Prayer.) Plaintiff also seeks punitive damages. (*Id.*, ¶ 57.)

10. It is widely recognized that personal injury claims facially meet the \$75,000 jurisdictional threshold. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 296 (S.D.N.Y. 2001) (finding that a complaint alleging various

injuries from taking a prescription drug “obviously asserts a claim exceeding \$75,000”). In addition, damages in excess of the jurisdictional amount of \$75,000 have been awarded in product-liability cases in Montana. *See, e.g., Patch v. Hillerich & Bradsby Co.*, 257 P.3d 383 (Mont. 2011); *Malcolm v. Evenflo Co.*, 217 P.3d 514 (Mont. 2009).

11. Other federal courts have similarly concluded that the amount in controversy exceeded \$75,000 in pharmaceutical cases. *See, e.g., Smith v. Wyeth, Inc.*, 488 F. Supp. 2d 625 (W.D. Ky. 2007) (denying motion to remand); *Copley v. Wyeth, Inc.*, No. 09-722, 2009 WL 1089663 (E.D. Pa. Apr. 22, 2009) (same).

12. Given Plaintiff’s claim that his late wife’s death was caused by Defendant’s product and his request for punitive damages, it is evident that the amount of recovery sought by Plaintiff exceeds \$75,000.

C. The Other Prerequisites For Removal Have Been Satisfied.

13. In addition to satisfying the requirements of diversity jurisdiction, Defendant has satisfied all other requirements for removal.

14. Defendant Ethicon Endo-Surgery, LLC was served with Plaintiff’s Complaint on December 15, 2020. Accordingly, this Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b).

15. The Montana Thirteenth Judicial District Court, Yellowstone County, is located within the District of Montana. *See* 28 U.S.C. § 1441(a).

16. No defendant is a citizen of the State of Montana, where this action was brought. *See* 28 U.S.C. § 1441(b).

17. Plaintiff has also named unknown Doe defendants 1-10, suing them by fictitious names. (Compl., ¶ 4.) The citizenship of defendants sued under fictitious names is disregarded for purposes of diversity jurisdiction. 28 U.S.C. § 1441(a); *West v. State Farm Mut. Ins. Co.*, 2011 WL 2559966 at *24 (D. Mont., June 28, 2011) (M.J. Lynch).

18. No previous application has been made for the relief requested herein.

19. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings and orders served upon defendants, which papers include the complaint, are attached collectively as Exhibit 1. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for plaintiff and a copy is being filed with the Clerk of District Court of Yellowstone County.

20. WHEREFORE, Defendant respectfully removes this action from the Montana Thirteenth Judicial District Court, Yellowstone County, bearing Number DV-20-1570, to this Court.

DATED this 11th day of January, 2021.

DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.

By /s/ Maxon R. Davis

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